

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No.3207/Mum/2017 (AY 2012-13)

M/s Noble Medicals BCJC Hospitals, S.V. Road, Santacruz, Mumbai-400054.	Versus	CIT, City-16, Mumbai.
PAN No.AAGFN4356A		
Applicant		Respondent

Applicant by	Shri Vipul Joshi - Advocate
Respondent by	Shri Bhupendra Kumar Singh -(CIT- DR)

Date of hearing: 05/02/2018

Date of order: 05/02/2018

ORDER

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of the Income Tax Act (the Act) is directed against the order of Id. CIT-16(3), Mumbai passed under section 263 of the Act dated 29.03.2017 for Assessment Year (AY) 2012-13. The assessee has raised the following grounds of appeal:
 1. On the circumstances and facts of the case the learned CIT erred in passing order u/s. 263 and directing the Assessing Officer to pass fresh assessment order. The order u/s. 263 dated 29.03.2017 is bad in law and be cancelled.
2. Brief facts of the case are that the assessee is engaged in the business of Drugs and Pharmaceuticals, filed its return of income for relevant AY on 27.09.2012 declaring taxable income of Rs. 88,84,350/-. The Assessment was completed on 03.03.2015 under section 143(3) of the Act. The Assessing Officer (AO) while passing the assessment order disallowed the Business Procurement Expenses of

Rs. 3,76,000/- and 20% of expenses consisting of Motorcar Expenses, Depreciation of Car, sale promotion and Business development expenses. The AO assessed the total income of Rs. 95,69,400/-. Aggrieved by the order of AO, the assessee filed appeal before the Id. CIT(A). Subsequently, the assessment order was set-aside by the Id. CIT and directed the AO to pass fresh assessment order in accordance with his direction. The Id. CIT while setting aside the assessment order passed the following order:

“In this case, the assessment proceeding u/s. 143(3) was completed on 03.03.2015.

2. Subsequent examination of records revealed that assessee has claimed expenditure on account of Business Development Exp to the extent of Rs. 4,24,000/-. As per the submission letter dated 06.11.2014 assessee said that "The Business Development expenses of Rs. 4,24,000/- are paid to Dr. Ramesh Desai and the Business Procurement expenses of Rs. 3,76,000/- are paid to R V Desai HUF. These expenses are incurred for supplies to indoor patients of Sarla Hospital and ICU, Dattatray Road, Santracruz West, Mumbai-400 054". As per the above submission these expenses included expenses related to Gift articles, Travel facility, Hospitality, Cash or monetary grant paid to customers or doctors amounting Rs. 8,00,000/-. Assessing Officer has disallowed Rs. 3,76,000/- and added in taxable income but not disallowed expenses of Rs. 4,24,000/- in the assessment order.

3. The Assessing Officer neither raised any specific query on the above issues nor discussed this matter in the assessment order. Thus, the assessment order was passed without making proper enquiries/verifications.

4. Accordingly a show cause notice dated 01.03.2007 was issued to the assessee asking him to show cause as to why the assessment order dated 03.03.2015 should not be revised u/s. 263 of the I.T. Act, 1961. In response assessee has submitted reply on 15.03.2015.

5. I have considered the submissions of the assessee and facts on record and I am of the opinion that the assessing officer should have made the enquiries/verifications before passing the assessment order.

Explanation 2 to section 263 is defined as under.

Explanation -2. For the purpose of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner-

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.].

6. I have carefully perused the facts on records the assessment order and various submission made by the assessee. It is noted from records the assessee had claimed business development expenditure of Rs. 4,24,000/- which was paid to Dr. Ramesh Desai and business procurement expenses of Rs.3,76,000/- which was paid to R. V. Desai (HUF). It is further noted that the expenses were incurred for supplies to indoor patients of Sarla Hospital. It is noted that these payments were against the guidelines issued by Indian Medical Council which had prohibited such expenses. The claim should not have been allowed by the AO u/s.37(1) of the Act. It is further noted that the AO made no attempt to inquire the genuineness of these payments and whether these were actually incur

for the purpose of business or not. The claim of the assessee was not verified at all by the AO.

7. During the course of proceedings before me it has been submitted by the assessee that it had filed an appeal before the CIT -7 and therefore the order passed by the AO cannot be examined u/s.263. I have carefully examined the issue and it is noted that since the AO has not made any addition on the issue the same cannot be subject matter of appeal and accordingly the issue is not subjudice before CIT(A) and therefore the contention of the assessee cannot be accepted. The Commissioner can examine the issues which are not subject matter of appeal u/s.263. It is further to be pointed out that the CIT(A) has not yet decided the matter and therefore, principle and merger is not applicable.

8. The assessee has also submitted the issue was examined by the AO and 20% of Rs. 4,24,000/- was disallowed. However, it is noted that disallowance was made on adhoc basis and without making due inquiries regarding the genuineness of expenses and whether such expenses were required for the purpose of the business of the assessee or not. Further, on this issue the appeal has not yet been decided.

9. In view of the above discussion the order u/s.143(3) dated 03.03.2015 is erroneous in so far as it is pre-judicial to the interest of Revenue. Hence, the order passed is apparently erroneous and prejudicial in so far as to the interests of the Revenue. Accordingly I hereby cancel the assessment order passed by the AO dated 03.03.2015 with the direction to pass fresh assessment concerning strictly the above referred issues after giving assessee due opportunity of being heard as per Act and Law.

3. Aggrieved by the order of Id. CIT, the assessee has filed the present appeal before us.
4. We have heard the Id. Authorised Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material

available on record. The Id. AR of the assessee submits that during the assessment proceeding, the AO made each and every possible query during the assessment. The assessee vide its reply dated 06.11.2014 furnished its submits regarding the disallowance on account of Business Development Expenses and Procurement Expenses, copy of which is filed at page no.2 6 of Paper Book. The AO disallowed Rs. 3,76,000/- on account of Business Procurement Expenses and out of Rs. 4,24,000/- Business Development Expenses 20% was disallowed. The AO has taken a possible view on the additions/disallowances. It was further submitted that the AO further issued notice under section 154 dated 11.06.2014 for rectification of the order on the basis of CBDT Circular No. 5/12 dated 01.08.2012 interalia stating therein that as per Indian Medical Council, (Professional conduct, etiquette and ethics) Regulation 2012, Regulation dated 10.12.2009 imposed a Prohibition Medical Practitioner and Profession from taking any gift, Traveller's facilities, hospitalities, cash or money from Pharmaceutical Company. The assessee filed its reply vide its reply dated 18.04.2016 and contended that the AO has disallowed 20% of Business Development Expenses out of Rs. 4,24,000/- and the assessee has filed appeal against the addition and as such the AO has no jurisdiction on the subject matter. The assessee has not received any communication thereafter. However, the Id. CIT issued notice under section 263 dated 01.03.2017 for revising the assessment order. The notice issued by Id. CIT is itself issued on wrong facts. The assessee has filed reply of show-cause notice issued by Id. CIT vide its reply dated 14.03.2017. In the reply, the assessee contended that after passing the assessment order by the AO, the AO had proceeded to rectify the same under

section 154 vide its notice dated 11.04.2016 and the proceedings are pending before the AO, on the said point, the order is sought to be revised under section 263 which is bad-in-law. The assessee further contended that the appeal against the assessment order wherein disallowance on account of Business Development Expenses and Business Procurement Expenses is already pending adjudication before the Id. CIT. It was further submitted that Circular No. 5/15 of CBDT dated 01.08.2012 is not applicable in the AY under reference. The same is applicable prospectively. In support of his submission, the Id. AR of the assessee relied upon the decision of Solvay Pharma India Ltd. Vs. PCIT [2018] 89 taxmann.com 249 (Mum Trib.), DCIT vs. PHL Pharma (P.) Ltd. [2017] 78 taxmann.com 36 (Mum Trib.), Dr. Reddy's Laboratories Ltd. vs. ACIT [2017] taxmann.com 398 (hyd. Trib.), Cadila Pharmaceuticals Ltd. vs. DCIT [2017] taxmann.com 354 (Ahmedabad Trib.), Macleods Pharmaceuticals Ltd. vs. ACIT [2016] 74 taxmann.com 250 (Mum Trib.). On validity of order passed under section 263, the Id. AR of the assessee submits that the order passed by AO is not erroneous and prejudicial to the interest of revenue. Even if the order is prejudicial to the interest of revenue, no revision as possible, if the order is not erroneous, provision cannot be invoked to correct each and every type of mistake in support of his submission the reliance is made on the decision of Hon'ble Apex Court in Malabar Industrial Co. Ltd. vs. CIT [(2000) 243 ITR 83 (SC)] and CIT vs. Kwaliti Steel Suppliers Complex [(2017) 395 ITR 1 (SC)] and decision of jurisdictional High Court in CIT vs. Gabriel India Ltd. [(1993) 203 ITR 108 (Bom)]. In other alternative submission, the Id. AR of the assessee submits that the order is invalid as the AO adopted and followed one of the possible views

while passing the assessment order. Merely facts that some other alternative method could fetch more revenue or the commission is not in agreement with the view taken by AO would not render the assessment order erroneous and prejudicial to the interest of revenue. The reliance is made in case of CIT vs. Max India Ltd. [(2007) 295 ITR 282 (SC)], Grasim Industry Ltd. vs. CIT [(2010) 321 ITR 92 (Bom)], CIT vs. LIC Housing Finance Ltd. [(2014) 367 ITR 458 (Bom)], CIT vs. Gera Developments (P) Ltd. [(2016) 387 ITR 691(Bom)] and CIT vs. Kiran Hirji Shah [(2015) 56 taxmann.com 360(Bom)]. In other alternative submission, the ld. AR of the assessee submits that no revisional power should be exercised for directing full enquiry, where the AO has already conducted sufficient enquiry and has taken a possible view after the enquiry. The power of revision can only exercise, where no enquiry as required under law is done. Reliance is made in case of CIT vs. Nirav Modi [(2017) 390 ITR 292 (Bom)], CIT vs. Nirav Modi [(2017) 77 taxmann.com 15(SC)], CIT vs. Nirav Modi [(2017) taxmann.com 78 (SC)], CIT vs. Sunbeam Auto Ltd. [(2011) 332 ITR 167 (Del)], CIT vs. Anil Kumar Sharma [(2011) 335 ITR 83 (Del)], CIT vs. New Delhi Television Ltd. [(2014) 360 ITR 44 (Del)]. In further alternative submission it was argued that the order of assessment cannot be held erroneous only because no elaborate discussion was made by AO while passing assessment order. Reliance is made on case law of CIT vs. Reliance Communication Ltd. [2016) 76 taxmann.com 226(SC)]. The ld. AR of the assessee finally submits that the order of revision cannot be different from the reasons stated in the show-cause notice. On the other hand, the ld. DR for the Revenue supported the order of CIT. The ld. DR submits that as per Explanation-1 of section 37, the payment

of commission paid to the Doctors is illegal and should not be allowed. The order of AO was thus erroneous and prejudicial to the interest of revenue.

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that while passing the assessment order under section 143(3) on 30.03.2015. The AO made the disallowance on account of Business Procurement Expenses of Rs. 3,76,000/-. Thus, certainly the disallowance was made after raising queries. We have further noted that out of total Business Expenses of Rs. 4,24,000/-, the AO disallowed 20% of the expenses. The assessee filed appeal before the Id. CIT(A). The appeal of the assessee was pending adjudication before the Id. CIT(A). The Id. CIT issued notice under section 263 dated 14.03.2017 during the pendency of appeal of the assessee before the Id. CIT(A) on the same disallowance. The Id. DR for the Revenue not disputed the pendency of appeal of assessee before the Id CIT(A) on the day, when the show-cause notice under section 263 dated 14.03.2017 was issued/served on the assessee. Clause-(c) of Explanation 1 attached with section 263 prescribe that where any order passed by AO is subject matter of appeal, the Id. PCIT or CIT shall not consider the subject matter which is to be decided in appeal, though he may consider which may not been considered or appealed in such appeal.
6. Further, we have noted that the notice under section 263 is wrong, so far as it relates to Business Procurement Expenses of Rs. 3,76,000/- paid to R.V. Desai (HUF). As the entire expenses was disallowed by AO while passing the assessment order. Further out of total Business Development Expenses claimed by the assessee. The AO already disallowed 20% of the expenses. Thus, the

observation of CIT is that 20% disallowance made by AO was without making due enquiry regarding the genuineness of the expenses is erroneous, the Hon'ble Apex Court in Malabar Industrial Co. Ltd. vs. CIT (supra) held that where two views are possible and the AO has taken one view, the order of CIT revising the order in such circumstances cannot be treated as order erroneous or prejudicial to the interest of Revenue. In our view, when the subject matter of disallowance was pending adjudication before the Id. CIT. The Id. CIT ought not to have revised the order for passing assessment order afresh. Thus, we hold that the order passed by CIT is bad-in-law and colourable exercise of his power under section 263 of the Act. Thus, we accept the appeal filed by assessee and set-aside the impugned order passed by Id. CIT. As we have allowed the appeal of the assessee on legal submission, the discussions on other submissions have become academic.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 05th February 2018

Sd-

(B.R.BASKARAN)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 05/02/2018

S.K.PS

आदेशकीप्रतिलिपिअग्रहित/Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

Sd-

(PAWAN SINGH)

JUDICIAL MEMBER

BY ORDER,

(Asstt.Registrar)

ITAT (Mumbai)